American Bar Association
www.supremecourtpreview.org

No. 06-1595

In the Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 19 OTHER STATES AND COMMONWEALTHS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MARC DANN
Attorney General of Ohio

WILLIAM P. MARSHALL*
Solicitor General
**Counsel of Record*
BENJAMIN C. MIZER
KIMBERLY A. OLSON
Deputy Solicitors
SUSAN A. CHOE
PATRICK M. DULL
DUFFY W. JAMIESON
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax

Counsel for Amicus Curiae
State of Ohio

TALIS J. COLBERG
Attorney General
State of Alaska

TERRY GODDARD
Attorney General
State of Arizona

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

BEAU BIDEN
Attorney General
State of Delaware

BILL MCCOLLUM
Attorney General
State of Florida

MARK J. BENNETT
Attorney General
State of Hawaii

LISA MADIGAN
Attorney General
State of Illinois

TOM MILLER
Attorney General
State of Iowa

JACK CONWAY
Attorney General
Commonwealth of Kentucky

MARTHA COAKLEY
Attorney General
State of Massachusetts

MICHAEL A. COX
Attorney General
State of Michigan

MIKE MCGRATH
Attorney General
State of Montana

ANNE MILGRAM
Attorney General
State of New Jersey

GARY K. KING
Attorney General
State of New Mexico

ANDREW M. CUOMO
Attorney General
State of New York

ROBERTO J. SÁNCHEZ-RAMOS
Secretary of Justice
Commonwealth of Puerto Rico

MARK L. SHURTLEFF
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

QUESTION PRESENTED

Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF AMICI INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

A. Protection under the participation clause does not require that anyone first file an EEOC charge 6

1. The "subchapter" at issue covers more than proceedings before the EEOC 7

a. The Sixth Circuit ignored the text and canons of statutory construction in its unduly restrictive interpretation of "under this subchapter." 7

b. Title VII's purpose and common sense both support a broader reading of "under this subchapter." 9

2. Section 2000e-3(a) protects participation in a state discrimination investigation 13

3. Title VII's objectives can only be met if participation in pre-charge investigations is encouraged and protected 14

B. The opposition clause protects employees who complain about being sexually harassed, regardless of when the complaints are lodged 16

1. The opposition clause protects several types of "opposition." 16

2. Crawford's complaint qualifies as "opposition." 17

3. Conduct during the course of a complaint can result in the denial of protection 19

4. Opposition does not require a victim-initiated complaint 20

C. Title VII must be interpreted to accomplish the statute's remedial objectives 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases **Page(s)**

Arnold v. Ben Kanowsky, Inc.,
361 U.S. 388 (1960)..... 22

Astoria Fed. Sav. & Loan Ass'n v. Solimino,
501 U.S. 104 (1991)..... 13

Aurecchione v. N.Y. State Div. of Human Rights,
771 N.E.2d 231 (N.Y. 2002)..... 2

Bilow v. Much Shelist Freed Denenberg Ament & Eiger, P.C.,
67 F. Supp. 2d 955 (N.D. Ill. 1999) 20

Burlington Indus. v. Ellerth,
524 U.S. 742 (1998)..... 5, 14

Burlington N. & Santa Fe Ry. v. White,
548 U.S. 53, 126 S. Ct. 2405 (2006)..... *passim*

Cardenas v. Massey,
269 F.3d 251 (3d Cir. 2001) 9

Clark County Sch. Dist. v. Breeden,
532 U.S. 268 (2001)..... 17, 19

Cobb v. Contract Transp., Inc.,
452 F.3d 543 (6th Cir. 2006) 22

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992)..... 7

Crawford v. Metro. Gov't of Nashville & Davidson County,
No.05-5258, 2006 U.S. App. LEXIS 28280
(6th Cir. Nov. 14, 2006) ..... *passim*

EEOC v. HBE Corp.,
135 F.3d 543 (8th Cir. 1998) 17

Evans v. Houston,
246 F.3d 344 (5th Cir. 2001) 9

Evans v. Kan. City Sch. Dist.,
65 F.3d 98 (8th Cir. 1995) 17

Faragher v. City of Boca Raton,
524 U.S. 775 (1998)..... *passim*

Fed. Express Corp. v. Holowecki,
128 S. Ct. 1147 (2008)..... 21

Hashimoto v. Dalton,
118 F.3d 671 (9th Cir. 1997) 15

Hicks v. ABT Associates, Inc.,
572 F.2d 960 (3d Cir. 1978) 10

Hochstadt v. Worcester Found. for Experimental Biology,
545 F.2d 222 (1st Cir. 1976) 19

Jencks v. Modern Woodmen of Am.,
479 F.3d 1261 (10th Cir. 2007)..... 22

Johnson v. Univ. of Cincinnati,
215 F.3d 561 (6th Cir. 2000) 16

Little Forest Med. Ctr. v. Ohio Civil Rights Comm'n, 575 N.E.2d 1164 (Ohio 1991) 1

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 19

McElroy v. State, 703 N.W.2d 385 (Iowa 2005) 2

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) 3

Mondaine v. Am. Drug Stores, Inc., 408 F. Supp. 2d 1169 (D. Kan. 2006) 16

Neiderlander v. Am. Video Glass Co., No. 03-1288, 2003 LEXIS App. 22745, (3d Cir. Nov. 5, 2003) 16

Oliver v. Pac. Nw. Bell Tel. Co., Inc., 724 P.2d 1003 (Wash. 1986) 2

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) 3

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) ..... *passim*

Slagle v. County of Clarion, 435 F.3d 262 (3d Cir. 2006) 7, 22

Smith v. Columbus Metro. Hous. Auth., 443 F. Supp. 61 (S.D. Ohio 1977) 13

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 8

Statutes and Rules **Page(s)**

29 CFR § 1626.10 (1990) 13

42 U.S.C. §§ 2000e through 2000e-17..... 7, 8

42 U.S.C. § 2000e-2 ..... 7, 10

42 U.S.C. § 2000e-3 ..... 7, 10

42 U.S.C. § 2000e-3(a) ..... *passim*

42 U.S.C. § 2000e-4(g)(1)..... 13, 14

42 U.S.C. § 2000e-5 12

42 U.S.C. § 2000e-5(b) 8

42 U.S.C. § 2000e-8(a) 8

42 U.S.C. § 2000e-16 8

Ala. Code § 25-1-18 (2008) 1

Alaska Stat. § 18.80.220 (2008) 1

Ariz. Rev. Stat. § 41-1464 (2008) 1

Cal. Gov't Code § 12940 (2008) 1

Conn. Gen. Stat. § 46a-60 (2008) 1

Del. Code Ann. tit. 19, § 711 (2008) 1

D.C. Code Ann. §2-1402.61 (2008) 1

Fla. Stat. Ann. § 760.10 (2008) 1

Ga. Code Ann. § 34-5-3 (2008) 1

Haw. Rev. Stat. Ann. § 378-2 (2008) 1

Idaho Code Ann. § 67-5911 (2008) 1

775 Ill. Comp. Stat. Ann. 5/6-1 (2008) 1

Iowa Code § 216.11 (2008) 1

Kan. Stat. Ann. § 44-1009 (2008) 1

Ky. Rev. Stat. Ann. § 344.280 (2008) 1

Me. Rev. Stat. Ann. tit. 5 § 4572 (2008) 1

Md. Code Ann. art. 49B, § 16 (2008) 1

Mass. Ann. Laws ch. 151B, § 4 (2008) 1

Mich. Comp. Laws Serv. § 37.2701 (2008) 1

Minn. Stat. § 181.67 (2008) 1

Mo. Rev. Stat. § 213.070 (2008) 1

Mont. Code Ann. § 49-2-301 (2008) 1

Neb. Rev. Stat. Ann. § 48-1004 (2008) 1

Nev. Rev. Stat. Ann. § 613.340 (2008) 1

N.H. Rev. Stat. Ann. § 354-A:19 (2008) 1

N.J. Rev. Stat. § 10:5-12 (2008) 1

N.M. Stat. Ann. § 28-1-7 (2008) 1

N.Y. Exec. Law § 296 (Consol. 2008) 1

Ohio Rev. Code Ann. § 4112.02(I) (2008) 1

Okla. Stat. tit. 25, § 1601 (2008)..... 1

Or. Rev. Stat. § 659A.030 (2008) 1

R.I. Gen. Laws § 28-5-7 (2008)..... 1

S.D. Codified Laws § 20-13-26 (2008)..... 1

Tenn. Code. Ann. § 4-21-301 (2008)..... 1

Tex. Lab. Code Ann. § 21.055 (2008) 1

Utah Code Ann. § 34A-5-102(17), (106) (2008) 1

Vt. Stat. Ann. tit. 21, § 495 (2008)..... 1

Wash. Rev. Code Ann. § 49.60.210 (2008)..... 1

W. Va. Code Ann. § 5-11-9 (2008) 1

Wis. Stat. § 111.322 (2008) 1

STATEMENT OF AMICI INTEREST

The Amici States have a direct interest in this case because it affects the efficacy of both state and federal efforts to combat unlawful discrimination. To begin with, the Sixth Circuit's narrow interpretation of what is required for an employee to "participate" in a sexual harassment investigation and to "oppose" an unlawful discriminatory practice threatens the Amici States' ability to enforce their own anti-retaliation provisions. Because almost every state retaliation statute mirrors the language found in Title VII,[1] the States look to federal law under Title VII for guidance in interpreting their own anti-discrimination laws. See, e.g., *Little Forest Med. Ctr. v. Ohio Civil Rights Comm'n*, 575 N.E.2d 1164, 1167

---

[1] See Ala. Code § 25-1-18 (2008); Alaska Stat. § 18.80.220 (2008); Ariz. Rev. Stat. § 41-1464 (2008); Cal. Gov't Code § 12940 (2008); Conn. Gen. Stat. § 46a-60 (2008); Del. Code Ann. tit. 19, § 711 (2008); D.C. Code Ann. §2-1402.61 (2008); Fla. Stat. Ann. § 760.10 (2008); Ga. Code Ann. § 34-5-3 (2008); Haw. Rev. Stat. Ann. § 378-2 (2008); Idaho Code Ann. § 67-5911 (2008); 775 Ill. Comp. Stat. Ann. 5/6-1 (2008); Iowa Code § 216.11 (2008); Kan. Stat. Ann. § 44-1009 (2008); Ky. Rev. Stat. Ann. § 344.280 (2008); Me. Rev. Stat. Ann. tit. 5 § 4572 (2008); Md. Code Ann. art. 49B, § 16 (2008); Mass. Ann. Laws ch. 151B, § 4 (2008); Mich. Comp. Laws Serv. § 37.2701 (2008); Minn. Stat. § 181.67 (2008); Mo. Rev. Stat. § 213.070 (2008); Mont. Code Ann. § 49-2-301 (2008); Neb. Rev. Stat. Ann. § 48-1004 (2008); Nev. Rev. Stat. Ann. § 613.340 (2008); N.H. Rev. Stat. Ann. § 354-A:19 (2008); N.J. Rev. Stat. § 10:5-12 (2008); N.M. Stat. Ann. § 28-1-7 (2008); N.Y. Exec. Law § 296 (Consol. 2008); Ohio Rev. Code Ann. § 4112.02(I) (2008); Okla. Stat. tit. 25, § 1601 (2008); Or. Rev. Stat. § 659A.030 (2008); R.I. Gen. Laws § 28-5-7 (2008); S.D. Codified Laws § 20-13-26 (2008); Tenn. Code. Ann. § 4-21-301 (2008); Tex. Lab. Code Ann. § 21.055 (2008); Utah Code Ann. § 34A-5-102(17), (106) (2008); Vt. Stat. Ann. tit. 21, § 495 (2008); Wash. Rev. Code Ann. § 49.60.210 (2008); W. Va. Code Ann. § 5-11-9 (2008); Wis. Stat. § 111.322 (2008).

(Ohio 1991) ("[F]ederal case law interpreting Title VII . . . is generally applicable to cases involving alleged violations of [Ohio's employment discrimination statutes].); *Oliver v. Pac. Nw. Bell Tel. Co.*, 724 P.2d 1003, 1005 (Wash. 1986) ("RCW 49.60 [Washington's prohibition against employment discrimination] is patterned after Title 7 of the Civil Rights Act of 1964 . . . [and] decisions interpreting the federal act are persuasive authority for the construction of RCW 49.60."); *Aurecchione v. N.Y. State Div. of Human Rights*, 771 N.E.2d 231, 233 (N.Y. 2002) (explaining that New York courts attempt to "resolve federal and state employment discrimination claims consistently" and federal case law "proves helpful to the resolution" of New York discrimination claims); *McElroy v. State*, 703 N.W.2d 385, 391 (Iowa 2005) (applying the same analysis to federal and state discrimination claims because Iowa's anti-retaliation statute "is in part modeled after Title VII"). Consequently, this Court's decision interpreting Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), will affect the States' interpretations of their own anti-retaliation laws.

This Court's opinion will also affect the viability of internal investigations that are critical to the States' anti-discrimination efforts. First, as *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), makes clear, employers, not courtrooms, provide the best mechanism to handle and correct employment harassment. *Id.* at 806 (explaining that litigation may be avoided if the employer provides a "proven, effective mechanism for reporting and resolving complaints of sexual harassment"). Employers can implement anti-discrimination policies and enforce those policies through internal investigations to

encourage systemic change and stop harassment much sooner than can government agencies. But when retaliatory practices chill employee participation, employers' investigations are neither complete nor completely effective. Second, if employers cannot effectively serve as the first and best line of defense, more employees will turn to state agencies charged with enforcing anti-discrimination laws, adding to States' civil rights caseloads and limiting their ability to address other discrimination issues. Third, leaving employees unprotected against retaliation during employers' internal investigations will affect employees' participation in EEOC and state-initiated investigations, because when an employee is unprotected against retaliation in one investigation, employees will be chilled from participating in all investigations.

SUMMARY OF ARGUMENT

Title VII "'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment,'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)), and the statute's anti-retaliation provision must be read "to provide broad protection from retaliation" to assure the employee cooperation upon which Title VII depends. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2414 (2006).

Title VII's anti-retaliation provision protects employees who either (1) oppose discriminatory conduct or (2) participate in a discrimination investigation. Specifically, the provision states that

"[i]t shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter" (the opposition clause), "or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the participation clause). 42 U.S.C. § 2000e-3(a).

Despite the provision's clear text and purpose, the Sixth Circuit, in *Crawford v. Metropolitan Government of Nashville & Davidson County*, No.05-5258, 2006 U.S. App. LEXIS 28280, at *7 (6th Cir. Nov. 14, 2006), held that Vicky Crawford did not "participate" in an investigation for purposes of coverage under Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), because no one had yet filed an EEOC Charge of Discrimination. *Id.* at *7. The Sixth Circuit further held, on the same reasoning, that when Crawford made her own complaint of sexual harassment during the same internal investigation, she did not "oppose" discrimination for purposes of coverage under § 2000e-3(a). *Id.* at *6. In short, according to the Sixth Circuit, participating in an employer's internal investigation of sexual harassment is not "participation," and opposing sexual harassment during an internal investigation is not "opposition" unless the employee initiated the original complaint for purposes of triggering Title VII's anti-retaliation protection. The court was wrong on both counts.

The primary purpose of Title VII's anti-retaliation provision—"[m]aintaining unfettered

access to statutory remedial mechanisms," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997),—cannot be achieved if Title VII is interpreted in a way that deters victims of discrimination from complaining about harassment. Cooperation is the key to accomplishing the goals of Title VII. *Burlington,* 126 S. Ct. at 2414 (2006) ("Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends."). In fact, as this Court explained in *Faragher*, 524 U.S. 775, and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), cooperation with internal investigations should be encouraged.

The Sixth Circuit's decision, however, *discourages* cooperation during an employer's internal investigation. The court's narrow reading undermines Title VII's effectiveness by permitting the threat of retaliation to deter both (1) third parties from participating in discrimination investigations and (2) additional victims of discrimination from cooperating with or complaining to the EEOC. In fact, its holding provides a perverse incentive for employers preemptively to terminate employees who might bring their own Title VII claims, contrary to this Court's Title VII precedent. See *Robinson*, U.S. 519 at 346 (rejecting an interpretation of Title VII that "would provide a perverse incentive for employers to fire employees who might bring Title VII claims"). If third-party participants and additional victims of discrimination are left without protections, they will be reluctant to cooperate in internal investigations, let alone to file claims of their own.

ARGUMENT

The Court should reverse the Sixth Circuit because the text and purpose of the participation and opposition clauses protect an employee who takes part in an employer's internal investigation. This textual reading is buttressed by the reality that employers' internal investigations play pivotal roles in ensuring that workplaces are free from discrimination and harassment. See *Faragher*, 524 U.S. at 806-07. To encourage cooperation in those investigations—and thereby to promote the policies advocated in *Faragher*—the participation clause must protect *all* participants in employers' internal investigations rather than leaving some participants vulnerable to retaliation. And the opposition clause likewise must protect those who, during the course of an internal investigation, complain about harassment they have personally experienced.

A. Protection under the participation clause does not require that anyone first file an EEOC charge.

In interpreting the participation clause, the Sixth Circuit disregarded the statutory construction canon that "courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). An analysis of the statutory "language itself, the specific context in which the language is used, and the broader context of the statute as a whole," *Robinson*, 519 U.S. at 341, confirms that the participation clause unambiguously protects Crawford's cooperation in her employer's investigation.

1. The "subchapter" at issue covers more than proceedings before the EEOC.

a. The Sixth Circuit ignored the text and canons of statutory construction in its unduly restrictive interpretation of "under this subchapter."

The Sixth Circuit first erred in narrowly construing the phrase "under this subchapter." The court held that "participation" covers only those activities taken after the filing of an EEOC charge. *Crawford*, 2006 U.S. App. LEXIS 28280, at *7. But that limited reading ignores the statute's plain text, which protects an employee who has "participated in any manner in an investigation, proceeding, or hearing *under this subchapter*." 42 U.S.C. § 2000e-3(a) (emphasis added). The "subchapter" under review covers an array of statutory sections; filing an EEOC charge is just one section. The language "under this subchapter," then, refers to *all* of the sections of Title VII that make employment discrimination unlawful, and *any* investigation into a violation of those laws is an investigation "under this subchapter." This is true for two reasons.

First, the "subchapter" is not limited to EEOC proceedings. Rather, "[t]he phrase 'this subchapter' refers specifically to *42 U.S.C. §§ 2000e through 2000e-17*, the provisions that set forth an employee's rights when an employer has discriminated against him or her on the basis of race, color, sex, religion, or national origin." *Slagle v. County of Clarion*, 435 F.3d 262, 266-67 (3d Cir. 2006). For example, among the many other matters addressed in the subchapter, §§ 2000e-2 and 2000e-3 identify various unlawful

employment practices, while § 2000e-16 specifically prohibits discrimination in federal government employment.

Of all the sections contained within §§ 2000e through 2000e-17, the Sixth Circuit fixated on the only one—§ 2000e-5(b)—that deals with filing an EEOC charge. But the phrase "under this subchapter" must be construed to mean what it says—that is, to encompass all of the sections within the range of provisions to which Congress expressly referred. The Sixth Circuit's contrary interpretation ignores the plain language and fails to interpret the protections afforded by § 2000e-3(a) to "assure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington*, 126 S. Ct. at 2414.

Second, "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (internal quotations omitted). When Congress intended in Title VII to premise the operation of a provision on the prior filing of an EEOC charge, it did so in clear and concise language. For example, § 2000e-8(a) specifically states that, "[i]n connection with any investigation of a charge filed under Section 706," the Commission shall have access to all evidence related to an investigation. In contrast, the anti-retaliation language of § 2000e-3(a) is much broader and includes within its purview any employee who has "participated in any manner in an investigation . . . under this subchapter." Thus, when Congress premised some but not all provisions

of Title VII on the filing of an EEOC charge, it is presumed that the differential treatment has some meaning.

b. Both Title VII's purpose and common sense support a broader reading of "under this subchapter."

Even if the text were ambiguous, although it is not, any such ambiguity should be resolved in favor of protection. That is so because it is the substance of the participating activity, rather than its technical form, that triggers the participation clause's protection. Indeed, several circuits have taken this path in interpreting the participation clause to protect "participation" unrelated to EEOC processes. In *Cardenas v. Massey*, 269 F.3d 251, 263 (3d Cir. 2001), for example, the lower court granted summary judgment and dismissed Cardenas's retaliation claim because he "had not shown that he engaged in a protected activity." *Id.* at 263. The Third Circuit reversed, holding that "Cardenas has pointed to evidence that he engaged in three protected activities between June 1994 and January 1995 in the form of his own discrimination complaint and his cooperation in the complaints of two other individuals." *Id.* at 263. Each of these three discrimination complaints was an internal complaint to the employer's EEO officer, not any formal charge to the EEOC. *Id.* at 260.

Other cases show that it is the type of participation, not the type of complaint, that matters. In *Evans v. Houston*, 246 F.3d 344, 352-353 (5th Cir. 2001), the Fifth Circuit reversed summary judgment in a case involving allegations of race and age discrimination during an internal grievance

hearing. The court held that because Evans was subpoenaed to be a witness in the grievance proceeding, she "participated" in activity protected under § 2000e-3(a). *Id.* at 352 n.7 ("resolving all doubts in favor of the nonmoving party, [citation omitted], we find the grievance hearing involved claims of discrimination."). And in *Hicks v. ABT Associates, Inc.*, 572 F.2d 960 (3d Cir. 1978), an employee directed his allegations of employment discrimination to HUD rather than to the EEOC. The charge was therefore lodged with an agency that is not an entity "under this subchapter." The employer argued that the employee had not "participated" under § 2000e-3(a) because he had not filed a charge with the EEOC. In response the court stated that "[d]efendant's interpretation would mean that if the employee first turned to the wrong agency even with a meritorious claim, that employee could be discharged before he was eventually directed to the EEOC. Such an interpretation would undercut the purposes of section 704." *Id.* at 969. The court further held that "[b]y addressing a complaint to HUD . . . Hicks was in the process of opposing allegedly discriminatory practices by his employer, and was protected by the Act." *Id.* The Third Circuit refused to construe "under this subchapter" so narrowly as to thwart the goals of § 2000e-3(a); the court instead looked to the substance of the participating activity.

These cases support the view that, provided an employee participates in an investigation into a matter made unlawful pursuant to §§ 2000e-2 and 2000e-3, the employer's internal investigation is an investigation "under this subchapter." This broad protection makes sense for two reasons. First, if an

employee's participation in an internal investigation is not protected, an employee will be less likely to cooperate, and the company therefore will be deprived of useful observations that could assist the employer in addressing the original complaint. Second, denying protection would frustrate § 2000e-3(a)'s primary purpose of maintaining unfettered access to Title VII's remedial mechanisms. These effects would further create an incentive for employers to terminate employees who might bring Title VII claims. See *Robinson*, 519 U.S. at 345-46 (1997) (rejecting an interpretation of Title VII that would create an incentive for employers to fire employees who might bring civil rights claims).

The Sixth Circuit's narrow interpretation of "under this subchapter" not only ignores the statutory text but also leaves third parties who participate in discrimination investigations without any protection. Internal investigations, whether initiated by employers or by government agencies, necessarily depend on third-party witnesses. The third-party employee who participates in an internal investigation engages in the same activity regardless of whether an EEOC charge has been filed. For example, if an employee files a sexual harassment charge with the EEOC against his employer and a third-party witness is questioned during the employer's ensuing internal investigation, even the Sixth Circuit's narrow interpretation would provide the third-party witness with "participation" protecting under § 2000e-3(a). But, for example, if an allegation of sexual harassment is lodged orally with the employer rather than in writing with the EEOC, then the Sixth Circuit would leave the exact same "participation" unprotected. The third-party

witness, who in either scenario might not know whether an EEOC charge has been filed, has "participated" in exactly the same manner in exactly the same internal investigation. Yet, inexplicably, his or her activity would no longer be protected due to the technical form of the original complaint. That incongruous result has nothing to do with the text of the statute and even less to do with Title VII's purpose.

Most third-party witnesses have no idea whether an EEOC charge is pending. The Sixth Circuit's decision thus has the strange result of effectively requiring a witness to ask whether a charge is pending if the witness is at all concerned about anti-retaliation protections. If a charge has been filed, participation is protected; if no charge has been filed, however, participation is not protected. Even if the witness nonetheless participates, this differential treatment could affect the fullness or forthrightness of his or her participation.

This additional burden and confusion will discourage participation in internal investigations and hamper unfettered access to the remedial statutory mechanisms of Title VII. Cooperation in an internal investigation should be encouraged, to allow employers to implement effective mechanisms for reporting and resolving sexual harassment. But the "broad [anti-retaliation] protection" previously described by this Court in *Burlington* may be accomplished only if investigation participants know that they are broadly protected, regardless of whether there is an accompanying formal written Charge of Discrimination filed under § 2000e-5.

2. Section 2000e-3(a) protects participation in a state discrimination investigation.

As explained above, nearly every State's anti-discrimination regime includes an anti-retaliation provision that protects both "participation" and "opposition" activities. Many of these States cooperate with the EEOC, and Title VII authorizes the EEOC to "utilize" state agencies to take charges on their behalf through work-sharing agreements. 42 U.S.C. § 2000e-4(g)(1); see also 29 CFR § 1626.10 (1990); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 106 (1991) (noting that the EEOC referred a federal discrimination claim to New York's Division of Human Rights for investigation).

Filing a discrimination charge with a state agency is also protected "participation" activity because § 2000e-4(g)(1) is a provision "under this subchapter." For example, *Smith v. Columbus Metropolitan Housing Authority*, 443 F. Supp. 61, 65 (S.D. Ohio 1977), held that the participation clause protected employees against "retaliation by defendant for plaintiff's decision not to participate in a pending [Ohio Civil Rights Commission] investigation and proceeding in the manner that defendant desired." The Sixth Circuit's interpretation, however, would deny protection to a participant in a state agency's investigation unless a charge also has been filed with the EEOC. See *Crawford*, 2006 U.S. App. LEXIS 28280, at *7 (denying protection to Crawford because no EEOC charge had been filed). Thus, participants in state discrimination investigations might be left unprotected by Title VII.

Congress never intended for participation in a state-initiated investigation to strip an employee of her Title VII remedies. Why, after all, would Congress instruct the EEOC to partner with state anti-discrimination agencies but then provide no protection for persons participating in those agencies' processes? The Sixth Circuit's decision to the contrary denies protection to all non-EEOC participants and fails to take proper account of § 2000e-4(g)(1). Worse yet, if this Court adopts the Sixth Circuit's erroneous interpretation, such a ruling could have persuasive effect in States in which the anti-discrimination statutes mirror Title VII, thereby leaving some employees without federal or state protection against retaliation.

3. Title VII's objectives can only be met if participation in pre-charge investigations is encouraged and protected.

The Sixth Circuit's approach also undermines this Court's commitment to internal investigations. See *Faragher*, 524 U.S. 775; *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). *Faragher* and *Ellerth* established a two-part affirmative defense for employers if they "exercise reasonable care to prevent and correct promptly any sexually harassing behavior" and if the employee fails to take "advantage of any preventative or corrective opportunities provided by the employer." *Faragher*, 524 U.S. at 807. In the wake of those decisions, internal policies and investigation procedures have provided employees with numerous avenues for reporting discrimination. Employees routinely use these policies and procedures before turning to the

EEOC for relief. As a result, employers' internal procedures are now essentially a pre-charge prerequisite to avoiding liability. They are part of the machinery of Title VII, in that they address and correct discrimination before the employee feels compelled to file a Charge of Discrimination with the EEOC. Accordingly, as part of the machinery of Title VII, participation in internal investigations should be protected. See *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (recognizing that the participation clause protects participation in the machinery set up by Title VII). Third-party witness cooperation in an employer's pre-charge internal investigation should be encouraged in order to address and correct unlawful behavior without the need for litigation. Instead of promoting cooperation, the Sixth Circuit's decision denies protection to these witnesses and discourages open and honest cooperation for fear of retaliation.

The Sixth Circuit also suggested that "[e]xpanding the purview of the participation clause to cover such [internal] investigations would simultaneously discourage them." *Crawford*, 2006 U.S. App. LEXIS 28280, at *11. To suggest, however, that an employer would be discouraged from investigating an existing complaint of sexual harassment—and thereby abandon its *Faragher* affirmative defense—solely because a participant in the investigation would be protected from unlawful retaliation is untenable. The court's decision presumes that conscientious employers would rather be free to retaliate against witnesses than address complaints of sexual harassment—a presumption that is not only unsupported by the evidence, but also beside the point under Title VII. As this Court

underscored in *Burlington*, 126 S. Ct. at 2414, cooperation is desirable not just during an EEOC investigation; it is always essential, whether the complaint is oral or written, internal or to the EEOC, involving a victim or a third-party witness.

B. The opposition clause protects employees who complain about being sexually harassed, regardless of when the complaints are lodged.

1. The opposition clause protects several types of "opposition."

"Opposition" under § 2000e-3(a) can take many forms. It can include "'complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices,'" *Crawford*, 2006 U.S. App. LEXIS 28280, at *6 (quoting *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000)), and complaints need not be made directly to management to constitute protected activity. In fact, even complaints voiced to a co-worker can be protected. *Neiderlander v. Am. Video Glass Co.*, No. 03-1288, 2003 LEXIS App. 22745, at *9-10 (3d Cir. Nov. 5, 2003) ("[O]pposition to discriminatory practices need not be made directly to managers in order to constitute protected activity . . . and [petitioner's] complaints to her co-workers, assuming they were communicated to management, would be the type of opposition to discrimination that § 2000e-3(a) seeks to protect."); *Mondaine v. Am. Drug Stores, Inc.*, 408 F. Supp. 2d 1169 (D. Kan. 2006) (extending Title VII protection to "[p]laintiff's complaints to her co-workers that everyone was prejudiced and that her supervisors were racist").

Courts have also routinely interpreted the opposition clause to protect more than just opposition to unlawful employment practices. The clause encompasses actions that oppose not only actual unlawful employment practices but also practices that the employee, in good faith, objectively and reasonably believes to be unlawful. *EEOC v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998); *Evans v. Kan. City Sch. Dist.*, 65 F.3d 98, 100 (8th Cir. 1995). This Court has noted this application, although it has not yet had the occasion to rule on the propriety of this interpretation. See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam).

2. Crawford's complaint qualifies as "opposition."

In holding that Crawford's activity did not rise to the level of "opposition" within the meaning of the statute, the Sixth Circuit committed two errors: (1) It diminished the nature of Crawford's conduct, and (2) it raised the bar for oppositional activity above what the statute requires.

The Sixth Circuit acknowledged that "Crawford told the investigators that Hughes had sexually harassed her and other employees." *Crawford*, 2006 U.S. App. LEXIS 28280, at *3. Elsewhere, however, the Sixth Circuit minimized the extent of her protests noting only that she "appear[ed] for questioning" and "relat[ed] unfavorable information about Hughes." *Id.* at *7. That euphemistic characterization dilutes what Crawford actually said and did. According to Crawford's testimony, Dr. Hughes asked several times to see her "titties" and, on one occasion, "grabbed her head and pulled it to his crotch." *Id.* at *3 n.1 (internal quotation

marks omitted). When viewing the factual evidence and drawing the inferences in favor of Crawford, as required under the summary judgment standard, see *id.* at *2, the fuller portrayal of the events is that Crawford opposed sexual harassment.

The Sixth Circuit also held that Crawford was not "opposed" to the harassment she experienced because her activity was not sufficiently "active" or "overt." *Crawford*, 2006 U.S. App. LEXIS 28280, at *7. The court stated that, to be protected, Crawford should have "instigated or initiated [a] complaint prior to her participation in the investigation" or taken "further action following the investigation." *Id.* This holding means that Crawford was unprotected because she registered her complaint during her employer's internal investigation rather than before or after it. In other words, under the Sixth Circuit's rule, no employees who are interviewed during an employer-initiated internal investigation are protected against retaliation if they disclose during the investigation that they experienced similar discriminatory treatment.

The Sixth Circuit's approach diminishes the importance and effectiveness of internal investigations and discourages employees from reporting harassing or discriminatory conduct during the time when it is most natural to do so. Victims of harassment may view the investigation of the alleged harasser as confirmation that they are not alone. They may therefore take the opportunity of an internal investigation to report what happened to them, as well, with the assurance that they, like the original complainant, will be protected.

The Sixth Circuit's decision, however, tells victims of harassment that they must report to investigators what they observed and experienced, but they cannot "oppose" what they observed or experienced once they enter the investigation room. This narrow interpretation of what should be broad protections afforded by Title VII frustrates the statute's purpose.

3. Conduct during the course of a complaint can result in the denial of protection.

Of course, not all complaints made during an internal investigation are automatically protected against retaliation. Courts deny "opposition" protection under § 2000e-3(a) when the employee's conduct accompanying a complaint is unreasonable, inappropriate, or unlawful. *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231-34 (1st Cir. 1976); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973) (recognizing that employers have a legitimate interest in employees' work performance).[2]

No facts in the record, however, suggest that Crawford's complaint was unruly, inappropriate, or

---

[2] When courts deny protection under the opposition clause, typically it is because the employee either lied in his or her complaint (or the employer genuinely believed the employee's complaint was a deliberate falsehood) or, as this Court recently stated, "no one could reasonably believe that the incident recounted . . . violated Title VII." *Clark County Sch. Dist.*, 532 U.S. at 270 (per curiam); see also *Damon v. Fleming Supermarkets of Fla., Inc.,* 196 F.3d 1354, 1363 n. 3 (11th Cir. 1999) ("An employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct.").

unlawful. To the contrary, the Sixth Circuit noted that Crawford was "cooperating" with her employer's, Metro School District, investigation when she delivered her complaint. *Crawford*, 2006 U.S. App. LEXIS 28280, at *7. Despite this cooperation, the Sixth Circuit's decision affirming summary judgment essentially holds that the context of Crawford's sexual harassment complaint trumps its substance.

4. Opposition does not require a victim-initiated complaint.

The Sixth Circuit's decision further suggests that Crawford's complaint was not "active" or "overt" enough to warrant § 2000e-3(a) protection because she had bad timing: "Crawford does not claim to have instigated or initiated any complaint *prior to* her participation in the investigation, nor did she take any further action *following* the investigation and prior to her firing." *Crawford*, 2006 U.S. App. LEXIS 28280, at *7 (emphasis added). As explained above, the Sixth Circuit's decision means that an employee is not engaged in protected activity so long as his or her complaint of harassment takes place during an employer's internal investigation. But this focus on the timing of Crawford's opposition, rather than its content, again elevates form over substance.

Nowhere in the statute, case law, or EEOC regulations does "opposition" activity require that the victim initiate the complaint him or herself before the employer launches an internal investigation. On the contrary, case law recognizes a broader understanding of oppositional activity. A written comment on a survey form, for instance, has been held to be protected "opposition." *Bilow v.*

Much Shelist Freed Denenberg Ament & Eiger, P.C., 67 F. Supp. 2d 955, 965-66 (N.D. Ill. 1999). Despite the fact that Bilow did not proactively instigate her complaint but instead voiced it in response to an employer-initiated survey, the court held that "Bilow has adequately alleged that she engaged in a protected activity and suffered an adverse employment action because of that activity. That is enough to save her claim from dismissal." *Id*. at 965. Surely a sexual harassment complaint made in the midst of a sexual harassment investigation warrants the same protection.

An employee should be free to report unlawful discrimination at any time. To hold that Crawford's complaint is unprotected would chill employees from providing truthful information to their employers for fear of legally sanctioned retaliation. But the Sixth Circuit's decision carves out an exception to the broad protection against retaliation when the employer, rather than the victim, initiates the forum in which the complaint took place. The Sixth Circuit provided no real rationale for this unprecedented exception, and the decision will chill an essential component to the success of Title VII: cooperation.

C. Title VII must be interpreted to accomplish the statute's remedial objectives.

Although the text of Title VII's anti-retaliation provision is clear, the statute's purpose also supports the conclusion that Crawford's conduct was protected against retaliation. Title VII is a remedial statute. *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008); *Burlington*, 126 S. Ct. at 2415; *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). As such,

Title VII must be construed broadly to accomplish its remedial purposes. *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1264 (10th Cir. 2007) ("As a remedial statute, Title VII must be construed liberally . . . ."); *Slagle v. County of Clarion*, 435 F.3d 262, 267 (3d Cir. 2006) ("Of course because Title VII is a remedial statute, it must be interpreted liberally."); see also *Robinson*, 519 U.S. at 346 (interpreting Title VII § 704(a) to include former employees in its coverage). This rule of broad application applies with special force to Title VII's anti-retaliation provision. "Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington*, 126 S. Ct. at 2414.

By the same token, exceptions to the coverage provided by remedial statutes should be interpreted narrowly. Otherwise, overexpansion of an exception would protect the very harm the remedial statute was designed to prevent. See *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (interpreting exceptions to the remedial FLSA narrowly); *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 559 (6th Cir. 2006) ("Following traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly.").

The Sixth Circuit's interpretation of § 2000e-3(a) protects the harm that the anti-retaliation provisions were designed to prevent. This interpretation allows employers to retaliate against their employees for participating in internal

investigations and for voicing their opposition to discrimination. This exception threatens to undermine the employee cooperation upon which Title VII depends, as well as employees' faith in anti-discrimination policies.

CONCLUSION

The Sixth Circuit's decision faults Crawford for (1) participating in Metro School District's discrimination investigation without a prior EEOC charge being filed and (2) choosing the wrong time to present her own complaint of sexual harassment. If the Court reverses this erroneous ruling, employees will still have the burden of establishing that they were terminated because they participated in the investigation or opposed discrimination. Reversing the Sixth Circuit merely confirms that employees who oppose discrimination or participate in investigations cannot be terminated for that reason.

Respectfully submitted,

MARC DANN
Attorney General of Ohio

WILLIAM P. MARSHALL*
Solicitor General
**Counsel of Record*
BENJAMIN C. MIZER
KIMBERLY A. OLSON
Deputy Solicitors
SUSAN A. CHOE
PATRICK M. DULL
DUFFY W. JAMIESON
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax

Counsel for Amicus Curiae
State of Ohio

April 16, 2008